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No. 655.
Supreme Court U.S.
FILED
APR 29 1901
JAMES H. MCKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1900

Ahsan Mirzaka,

Petitioner,

against

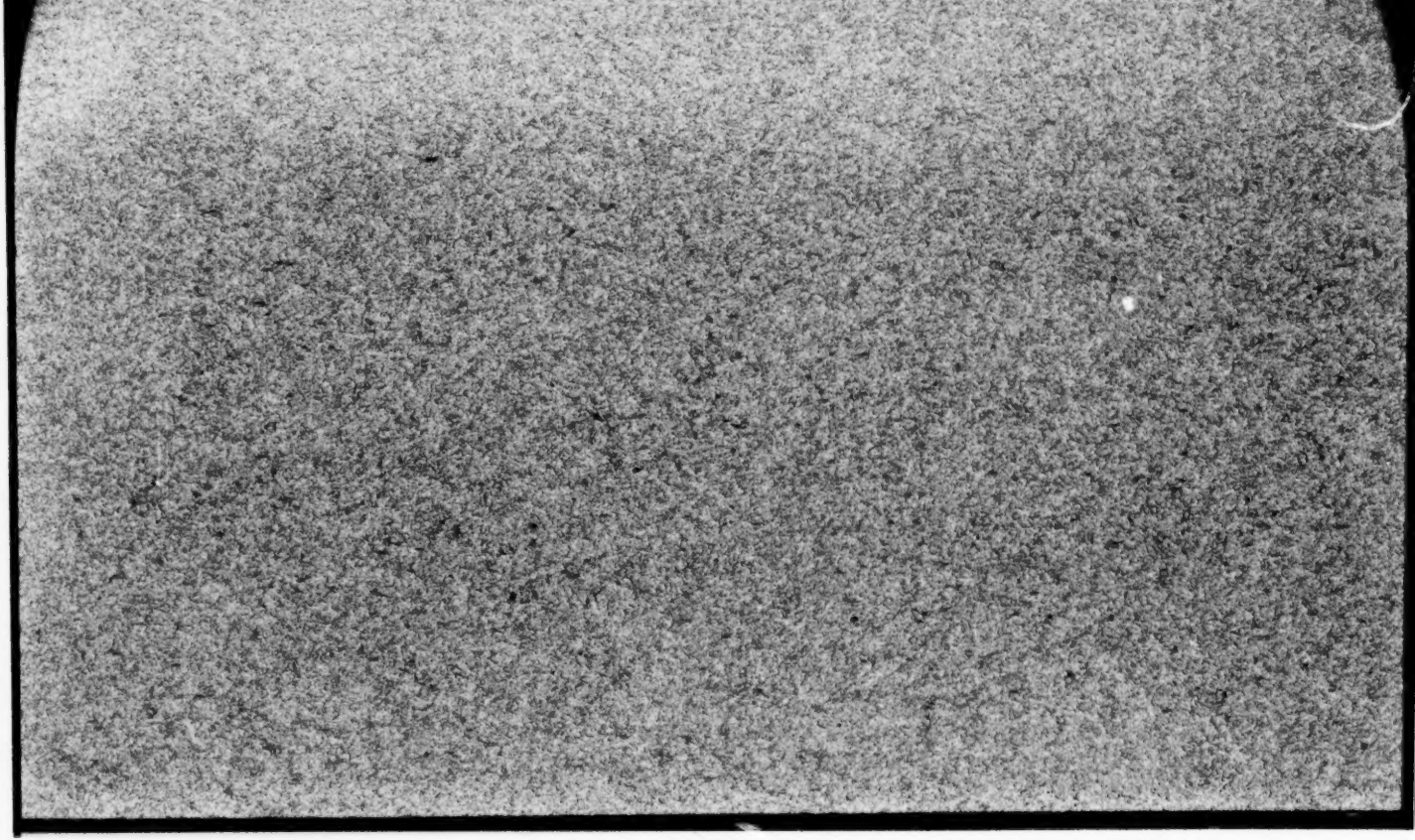
2 Cargo of Java Sugar, ex Ship "Sentinel"
James H. Doyle et al.

Claimants.

PETITION FOR WRIT OF CERTIORARI

Charles A. Kinsler,
Proctor for Petitioner.

A. Fenton Mirzaka,
Counsel & Proctor,
Of Counsel.



Supreme Court of the United States,

OCTOBER TERM, 1900.

ANTON MENCKE,
Libelant-Appellee, Petitioner,

AGAINST

A Cargo of Java Sugar, ex Ship BENLARIG, JAMES N. JARVIE *et al.*,
Claimants-Appellants.

SIRS:

Please take notice that the annexed petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the Second Circuit will be presented to the Supreme Court of the United States on Monday, April 29, 1901.

Dated New York, April 25, 1901.

Yours, &c.,
CONVERS & KIRLIN,
Proctors for Anton Mencke, Petitioner.

To Messrs. BUTLER, NOTMAN, JOLINE & MYNDERSE,
Proctors for Claimants.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

ANTON MENCKE,
Libelant Appellee, Petitioner,

AGAINST

A Cargo of Java Sugar ex Ship BENLARIG, JAMES N. JARVIE *et al.*,
Claimants-Appellants.

Petition for certiorari to the Circuit Court of Appeals for the Second Circuit.

TO THE HONORABLE THE CHIEF JUSTICES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

The petition of Anton Mencke respectfully shows unto this Court as follows:

I.—The case now sought to be brought into this Court presents for decision the questions:

a. Whether under a charter-party which provides that the charterer may order the vessel with her cargo to proceed to "a *safe* port * * * or so near the port of discharge as she may *safely* get and deliver the same always afloat, in a customary place and manner in such dock as directed by charterers, agreeably to Bills of Lading," the ship may be ordered by the charterer to proceed to a dock above the Brooklyn Bridge in the harbor of New York, although the vessel's masts are so tall that they would

have to be destroyed to enable her to pass under the bridge; and

b. Whether a further clause in the charter party, which provides that "lighterage, if any, to reach the port of destination *or deliver the cargo* at port of destination *remains for account of receivers, any custom of the port to the contrary notwithstanding,*" may be so construed with reference to a custom of the port, or in any other way, so as to place the cost of lightering on the vessel if she is unable to reach the dock to which she is ordered, for the reasons stated above.

II. The libel was filed in the United States District Court for the Eastern District of New York on May 27, 1899, by the master of the British ship Benlarig to recover an unpaid balance of freight amounting to $1,929.52. This sum was deducted from the freight by the receivers of the cargo, to cover the cost of lightering the cargo from the dock below the Brooklyn Bridge where it was discharged, to the claimants' refinery which was above the Bridge. The ship had been ordered by the receivers to proceed directly to the claimants' refinery, but had been unable to do so because the height of her masts was such that she could not pass under the Bridge.

On January 29, 1900, a final decree was entered in favor of the libelant adjudging that the cost of lighterage should be borne by the cargo (p. 114).

An appeal from this decree was taken by the claimants to the United States Circuit Court of Appeals for the Second Circuit, and on April 3, 1901, an opinion was handed down by that Court reversing the decree of the District Court and remanding the case with directions to dismiss the libel, with costs (pp. 119-124) on the ground that the claim that the lighterage should be borne by the cargo was within the letter of the lighterage clause, but was not within its spirit.

III.—The facts of the controversy are these:

The ship Benlarig was chartered under a charter-party dated London, July 1, 1898, between Watson Brothers, her owners, and Erdmann & Sielcken, merchants of Batavia, Samarang and Sourabaya, by which it was agreed that the Benlarig should load at Java "a full and complete cargo of dry sugar in baskets and (or in bags" "and being so loaded * * * shall (unless ordered to a direct port of discharge on signing last bills of lading) thereafter proceed to Barbadoes, thence Queenstown or Falmouth as directed by charterers or their agents for orders, to discharge always afloat, either at a *safe* port in the United Kingdom or on the Continent of Europe between Havre and Hamburg, both included, Rouen excluded, or at option of charterers to order vessel from Barbadoes to proceed to Delaware Breakwater for orders to discharge at New York or Boston or Philadelphia or Baltimore, *or so near the port of discharge as she may safely get*, and *deliver the same, always afloat*, in a customary place and manner, in such dock, as directed by charterers agreeably to bills of lading." (*Charter party, Libel and's Ex.* 2, fols. 23, 24).

It was further provided in the charter party, Section 4 (fol. 27):

"All goods to be brought to and taken from alongside of the ship, always afloat, *at the said charterer's risk and expense*, who may direct the same to the most convenient anchorage; *lighterage*, if any, *to reach the port of destination, or deliver the cargo at port of destination, remains for account of receivers, any custom of the port to the contrary notwithstanding.*"

The Benlarig duly loaded a full cargo of sugar in Java as provided by the charter-party (fol. 72) and then proceeded to Barbadoes (*Mencke*, fol. 98). She was there ordered to proceed to New York, which she did directly (*Mencke*, fols. 99, 98).

Bills of lading or receipts had been issued at the

ports of loading, reciting the shipment of the quantities of sugar noted in the margin. All the bills of lading contained the identical conditions that the sugar was "to be delivered in the like order and condition at the port of discharge as per charter-party dated London, 1st July, 1898 (the dangers of the seas excepted) unto Messrs. Winter & Smillie as agents or to their assigns, he or they paying *freight for the said sugar as per charter-party.* General average, if any, to be settled according to York-Antwerp rules 1890, *all other conditions and exceptions*, negligence and Harter Act clauses included, *as per charter-party above referred to* with average accustomed" (*Libelant's Ex.* 3, 4, 5 and 6; fols. 47, 51, 55 59).

Before or at about the time of the arrival of the Benlarig at the port of New York the cargo and the ship's documents including the above mentioned charter-party and bills of lading were sold and transferred to the firm of Arbuckle Brothers (*Gilmour*, fol. 418). This firm claimed to be the owners of the cargo and were in possession of the documents covering it on the ship's arrival (fols. 126, 74, *Gilmour* fol. 417). The delivery of the sugar was made to Arbuckle Brothers (*Gilmour*, fols. 395, 396).

The vessel arrived at New York on April 14, 1899, and on April 15, notice of her arrival and entry at the Customs House together with a request for orders for a discharging berth were sent to the claimants by the vessel's agents (*Libelant's Ex.* 9, fol. 128). At the same time the claimants were notified that the vessel's masts being in one piece would not admit of her passing under the Brooklyn Bridge (fol. 129).

Notwithstanding this notice the claimants after conferring with their London house (fol. 132) gave the vessel orders to discharge at their refinery at the foot of Pearl street, Brooklyn (*Libelant's Ex.* 7, fol. 121). The place of discharge thus selected by the receivers, who stood in the position of the charterers, was above the Brooklyn Bridge.

The clear height of the central span of the Brooklyn Bridge above mean high water is 135 feet (*Martin*, fol. 242).

The average rise and fall of the tide from 1893 to and including 1898 was 4.5 feet (*Spaulding*, fol. 208). The daily tide record from April 15 to May 2 is before the Court (*Spaulding*, fols. 206-208, 233-235). This record shows that the actual rise and fall did not vary materially from the average or mean rise and fall.

At dead low water, therefore, there was not more than 140 feet in the clear at the highest point of the Bridge.

The Benlarig is a three-masted, square rigged ship (*Meneke*, fol. 184). She had three steel masts, built up solid from the bottom to the top (*Meneke*, fol. 158). They were built of cylindrical steel plates, riveted together with internal angle iron braces (*Meneke*, fols. 159, 160).

The mainmast was 139 feet 10 inches above the deck (*Meneke*, fols. 153, 155). The deck at that point was 5 feet 2½ inches above the deep water load line (*Meneke*, fol. 155). The total height of the mainmast above the load line was therefore 145 feet ½ inch.

The foremast was 136 feet 8 inches above the deck (*Meneke*, fols. 153, 155), but the height of the deck above the water line at that point is 7 or 8 feet (*Meneke*, fol. 156), so that the height of the foremast was 143 feet 8 inches or 144 feet 8 inches above the load line or within several inches of the height of the mainmast.

The mizzenmast was 129 feet above the deck (*Meneke*, fol. 155), and the deck was 7 feet above the load line (*Meneke*, fol. 156), so that the mizzenmast was 136 feet above the water line.

On this occasion the vessel was loaded down to her Plimsol line (*Meneke*, fols. 183, 181, 170).

The vessel, therefore, required 145 feet of clear space in order to pass underneath the Bridge.

At dead low water the ship could not pass under

the Bridge without cutting off at least 5 feet from the steel mainmast and foremast (*Meucke*, fol. 178; *ante*, p. 6). On account of the movement of the water a margin would doubtless have had to be allowed for. This would have meant the loss to the ship of 8 or 10 feet of her masts, together with their rigging.

Accordingly, on receipt of these orders on April 15th (*Libelant's Ex.* 7, fol. 121), the vessel's agents again notified the claimants that it was impossible for the ship to pass under the Bridge, and asked for further orders for a discharging berth (*Lebelant's Ex.* 11, fol. 134). No immediate reply was received to this request, and on April 18th the ship's agent again wrote to the claimants asking for another discharging berth, and adding that in default thereof the cargo would be discharged and lightered to the dock already designated by the claimants. The agents further stated:

"If this be your determination, please name the point and send the lighter. We shall look to you and the cargo to pay lighterage in accordance with clause 4 of the charter-party" (*Libelant's Ex.* 13, fols. 141, 143).

The claimants then gave orders for the Benlarig to go to West Central Pier, Atlantic Dock, below the Bridge, to which place they would send lighters to take the sugar from the vessel to the refinery. They also gave notice at the same time:

"We do this in order to save any further delay in discharging vessel, but we beg to distinctly advise you that this action of ours does in no way prejudice our position as regards liability for the lighterage expenses of the cargo, which we claim, under the charter party, is payable by the ship and her owners. The question as to the parties liable for expenses of lighterage can be settled later, but we distinctly disclaim all liability" (*Libelant's Ex.* 12, fols. 138, 139).

It was finally agreed that the discharge of the cargo into lighters at the West Central Pier should

be without prejudice to the rights of either party under the charter and without waiver of the ship's lien on the cargo for the balance of freight or of the claimants' contention that the ship was bound to go above the Bridge, or to pay the cost of lighterage if she unloaded below it (*Answer to 2nd Int.*, fol. 78).

The claimants paid for the lighterage, which amounted to $1,466.12 (*Gilmour*, fol. 397), and deducted this sum from the amount of freight paid by them (*Gilmour*, fol. 418).

In this suit to recover the balance so withheld, the sole controversy is as to which party should pay these lighterage charges, assuming that the ship could not pass under the Bridge without cutting two of her masts, and that she declined to accept orders to discharge her cargo above the Bridge for that reason (*Libelant's Ex.* 13, fol. 142).

IV.—The libelant maintains:

(1.) The right of the receivers, under the clause of the charter-party heretofore quoted (*ante*, p. 1), to select the dock for the discharge was subject to the limitation that such dock must be one that was safe and suitable for the ship as well as for the cargo and one by which the ship could proceed without hindrance by permanent obstacles, which she could not pass without being mutilated, crippled or dismantled.

(2.) Under clause 4 of the charter-party (*ante*, p. 4), any lighterage necessary to deliver the cargo at the port of destination must be paid by the charterers.

The claimants, in effect, contend:

(1.) Their right under the charter-party was so absolute that they could designate a dock above the Bridge although the Bridge was too low for the vessel to pass thereunder.

(2.) The ship was bound to deliver her cargo at the designated dock even though her masts should have to be cut to enable her to reach the dock, or in the alternative that the vessel should have the cargo lightered to the dock at her own expense.

(3.) That by the custom of the port the lighterage clause in the charter party does not mean what it says.

V.—The District Court held that it was exceptional for a ship to have immovable masts so high that she could not pass under the Bridge and that there was no custom or practice among the shipping merchants to meet such a case (fols. 437, 438); that the rights of the parties could be ascertained only from the charter-party (fol. 439); that although the charter-party may be such an one as was usually employed in the Java sugar trade as the claimants contended, and for whatever purposes the stipulations in it had been embodied originally, they had been retained in view of existing structures and were sufficiently broad to relieve the ship (fol. 440). The Court further held that the lighterage was necessary to deliver the cargo after the ship reached the port of destination and that the receivers had expressly stipulated that in such event they should pay the lighterage (fols. 444, 445).

A decree for the libelant was accordingly entered for the cost of the lighterage (p. 114).

VI.—The reasons for the conclusions reached by the District Judge are stated in the following extracts from his opinion:

"Before considering the charter party it should be stated that the ship has been before at the port of New York, and the owners well knew that she could not pass under the Bridge without disturbing her masts. It is not understood that the charterers had this knowledge. On the other hand there is no notice to the ship that it would be necessary

to discharge the cargo above the Bridge, although in fact about seventy-five per cent. of the sugar now received at this port is so discharged. If this knowledge of the owners be urged against them, it may be answered that for this very reason they may have considered themselves protected by the terms of the charter-party, and in fact all previous notice, or understanding by either party must be regarded as merged in the charter party, and to the interpreting of that instrument resort must be had to ascertain the relative rights.

"The charter is stated by a witness connected with claimants' factory to be the same charter usually employed in the Java sugar trade, although the words 'always afloat' seem to have been interlined in the fourth subdivision. The essential question is whether the provisions of the charter already quoted relieve the ship from delivering cargo above the Bridge. For whatever purposes such stipulations were originally embodied in charter-parties, they have been retained and adopted for use in view of existing structures, and it is considered that the provisions are sufficiently broad to relieve the ship. This conclusion is reached through no ingenuity of construction but by giving to the language the meaning which might be ordinarily gathered from the words used. The initial agreement in the charter is to deliver the cargo at one of several ports, "so near the port of discharge as she may safely get, and deliver the same, always afloat, in a customary place and manner, in such dock as directed by charterers." This provision seems to be a direct stipulation to deliver the goods at any place where the ship might float, in such dock as directed by the charterers, in a customary place and manner, when such dock shall have been reached. The evident intention is that the ship shall go to the designated port, if she can get there in safety, and the continuing thought seems to be, that she shall deliver the goods in a dock designated by the charterers, in a customary place, and in a customary manner. Any intelligent construction would seem to demand that the ship would not be ordered to a dock where it would be unsafe for her to go, whether the danger arose from the depth of water, or any other cause. For instance, the ship could not be ordered to a slip which was too

narrow to receive her, or where there was some overhanging shed or house that would prevent. So, if the entrance to the dock were obstructed, or there was other interference with the discharge at the place designated.

"But section four is explicit, and states that the goods are to be taken from alongside the ship at the charterers' risk and expense, although they are permitted to direct her to the most convenient anchorage, and that any lighterage, either to reach the port of destination, or to deliver the cargo at such port, shall be paid by the receivers, notwithstanding any contrary custom of the port. Now, lighterage was necessary for the purpose of delivering this cargo after the ship reached the port of destination, for the reason that the ship could not make the delivery without such lighterage, unless she was mutilated by the cutting off of her masts. The proposition then is: if the charterers stipulate to pay the lighterage necessary for the purpose of delivering the cargo, may they be excused from observing this agreement upon the plea that no lighterage would be necessary if the masts of the ship were cut down to a certain length? It is thought that it is the privilege of the ship to be preserved from self-mutilation, and that she need not be crippled, deformed or dismantled for the purpose of delivering her cargo. Apparently that should never be required. It should not be expected. Rather than that it is expectable that the cargo should be lightered by the shipowners, and that they would pay for the same. But the expectation as to the person upon whom the payment of the lighterage should fall changes when it appears that there is a stipulation that the receivers shall themselves pay the lighterage. It is useless to conjecture respecting these stipulations, where they are, as in the present case, unambiguous. It is better to take words at their apparent ordinary meaning, and hold parties to their agreement according to the plain sense of the language used. Adopting such rule the libelant should recover (pp. 110-112).

"If what appears to the Court to be a plain statement of duties in this instance favorable to the libelant has quite other significance, yet it would be considered that the claimant should not succeed. The ship stipulated to deliver the cargo at one of many ports, and while it was undoubtedly her duty, after arriving at a designated port, to go to such point

therein as she could safely, it is thought that she would not be obliged to go to such point in the harbor at the peril of injury, or at the sacrifice caused by mutilation of her masts. It seems that in selecting a convenient dock for discharging in a harbor, the receivers of the cargo must select one which the ship can physically approach, and if there be a permanent structure in the way, the conception that the ship should not encounter this would seem to enter into the spirit and understanding of their agreement" (pp. 113, 114).

VII.—The Court of Appeals, in stating the facts, quoted that part of the opinion of the District Court which is given in folios 429-437, and further found, as did the District Court, that there was "no custom in the port of New York respecting the course to be pursued by vessels directed to discharge above the Bridge, which have immovable masts too high to permit a passage beneath the Bridge" (p. 121); and that "charters sometimes provide that the vessels shall not go above the Bridge, and sometimes that charterers have the right to order the ship above the Bridge, they paying the expense thereof" (p. 122).

VIII.—The Court of Appeals, however, disagreed with the conclusions of the District Judge and held:

(*a*) That the exceptional height of the vessel's masts and the unusual character of their construction alone interfered with the vessel's performance of her part of the contract, and that "unquestionably but for Article 4 she would have been obliged either to deliver or to pay for the damages occasioned by non-delivery at the Arbuckle dock" (p. 122).

(*b*) That although the question was not easy of solution (p. 122) the ship could place no reliance on the lighterage clause (4) of the charter-party under which she was acting, because "*the facts of this case are within the letter of the article, but not within its spirit*" (p. 124).

IX.—The reasons of the Court of Appeals were stated by Shipman, *J.*, as follows:

"On the construction of the two provisions of the charter-party which apparently are applicable to this case, the question, not easy of solution, arises.

"By Article 1, the vessel was to discharge as near the port of discharge as she could safely get, and deliver the cargo, always afloat, in a customary place and manner, at the dock directed by charterers.

"New York was one of the designated ports, and no question arises as to her safety. In this respect the facts of the case differ from those in "*Re* an Arbitration between Goodbody & Co., and Balfour, Williams & Co.," 8 Asp. Mar. Law, 303, in which Manchester was held not to be a safe port for the vessel in question, because, by reason of the height of her masts, she could not get under Runcorn Bridge, about twenty-four miles from Manchester and about twelve miles from the entrance of the canal, and the ship would have to be dismantled twenty-four miles from the port. The Benlarig was in the port of discharge, and the Arbuckle dock was a safe one where she could be always afloat, and a customary place for the discharge of sugar. The exceptional height of her masts and the unusual character of their construction alone interfered with the vessel's performance of her part of the contract, and, unquestionably, but for Article 4, she would have been obliged either to deliver or to pay for the damages occasioned by non-delivery at the Arbuckle dock. Article 4 provides that lighterage if any, to deliver the cargo at the port of destination is to be paid by the receivers, any custom of the port notwithstanding. The argument of the libelant by which the two claims are sought to be made harmonious, and in which the District Judge concurred, is that the cargo is to be delivered at the usual and customary place designated by the charterers or by the single consignee of the entire cargo; but if such delivery is prevented by a permanent cause, such as lack of depth of water or permanent obstructions at the port, and the cargo must be lightered, the expenses of such lightering are to be borne by the charterers. In the application of the construction, the libelant urges that as the Brooklyn Bridge prevented a delivery beyond it, and, as a mutilation or destruction of the ship's masts would be a serious injury and recourse must be had to

lighters, the state of facts provided for by Article 4 existed.

"Article 4 is a well known provision and was introduced into charter-parties originally to provide for the payment of lighterage when the vessel was unable to deliver the cargo at the dock to which she had been assigned from a cause to which vessels generally might be expected to be subject, such as shoal water or a bar, and if the Brooklyn Bridge was an obstruction to vessels generally or to such a proportion of vessels as to have become a well recognized impediment to navigation, the construction of the libelants would be correct. This form of charter is the one commonly used in the sugar trade for the purpose of meeting a customary condition of affairs in different ports, and in regard to which a custom of the port would naturally exist. The facts in this case were exceptional and eccentric. When vessels having too high masts which can be lowered are ordered to go above the Bridge, the masts are housed and the vessels proceed. In the rare instances which appear in the record of immovable masts of excessive height, they were cut. In this case, the vessel had steel masts of excessive height and a recent, exceptional and immovable method of construction, which makes the repair of the masts a serious affair. The owners knew or had reason to know of this peculiarity, but did not insert a provision in the charter that she should not be required to go above the Bridge, but preferred to rely upon Article 4. The case is that of the claimed application to novel circumstances of a clause intended for a different set of circumstances, and is as if a vessel, unable by reason of its novel construction to reach a dock which ninety-nine per cent. of vessels do reach, should desire to place the expenses of lighterage upon the charterers under Article 4. Such an attempt would be and the facts of this case are within the letter of the article, but not within its spirit" (pp. 122-124).

X. It is submitted that the Court of Appeals were in error in their conclusions on both branches of the case.

The Court say "The Benlarig was in the port of discharge, and the Arbuckle dock was a safe one where she could be always afloat, and a customary place for the discharge of sugar" (p. 122).

This, in effect, is a holding that the claimants fulfilled their duty to designate a safe dock by indicating a dock where there was sufficient water for the Benlarig to float, if she could reach it, and where many vessels could safely get, but where the Benlarig could not go without cutting her masts.

This charter-party, however, was made for a particular ship, the Benlarig, and the place designated for her discharge must be a safe one *for her* and one where she may discharge always afloat; otherwise the terms of the charter will not be fulfilled.

When the owners chartered their vessel they were not concerned with and doubtless did not consider the possible or probable capabilities of other vessels with respect to the various ports in the world. They were making a charter for their own vessel, whose qualities they knew, and they required that she should not be ordered by the charterers to any port or dock which was not safe for her, and was not one where she could discharge "always afloat."

It has been held in many cases that under clauses similar to the ones here considered the place of discharge must be one which the ship can float into, lie afloat in, and float out of (*The Alhambra* (1881), 6 Pro. Div., 68, in the Court of Appeal; *Shield* v. *Wilkins*, 5 Exch., 304; *The Nifa* (1892) Pro., 411; *Reynolds* v. *Tomlinson* (1896), 1 Q. B., 586; *Hayton* v. *Irwin*, 5 C. P. D., 130; 4 Asp. Mar. Law Cas., 212).

The *Alhambra*, the *Nifa*, and *Reynolds* v. *Tomlinson*, hold that a ship cannot be compelled to lighter cargo in order to enter a port; and by the same reasoning a ship in port should not be compelled to lighter cargo in order that it may reach a particular dock. Conversely, *Shield* v. *Wilkins*,

holds that a provision requiring a ship to proceed to a designated port or so near thereto as she could safely get, and there load a cargo, would not oblige her to enter the port to load, unless there was sufficient water for her to get out again with her cargo.

If these limitations apply to a safe port, it would seem that with equal weight they would apply to a safe dock in a port.

Mr. Elliott, one of the claimant's witnesses, says, (fol. 336) indeed, that under these clauses in a charter the custom here is that the charterer may order the vessel to a *safe* dock to discharge her cargo.

Judged by the qualifications required in the above cases the Arbuckles' dock was not a safe one for the Benlarig, for she could neither float into it nor out of it.

The reasonableness of such requirements seems obvious, irrespective of authority.

How can the dock be a safe one for the vessel if she cannot reach it?

The Benlarig would have had to lose about ten feet of her masts to go under the Bridge, loaded, and about twenty feet to come down lightened of her cargo.

Let it be supposed that the Brooklyn Bridge was a drawbridge and not more than 25 or 35 feet above the water instead of 135. If the width of the draw was sufficient to enable the large majority of all the vessels in the world to pass, but yet it was too narrow by only a few inches for the Benlarig, can it be supposed that she would be required to shave a few inches off her side planking to enable her to get through or else pay the cost of lightering the cargo?

Or if there was a draw bridge through which in ordinary course any ship might pass, but the draw was not in working order and could not be opened at the time the dock was designated to the vessel, must the ship bear such risk, and if she cannot

reach the designated dock, through by no fault of her own, must she pay the expense of lightering the cargo though she is ready to discharge directly at any dock she can safely reach?

As the District Judge suggests (fol. 115), "The ship could not be ordered to a slip which was too narrow to receive her or where there was some overhanging shed or house that would prevent."

But under this decision of the Court of Appeals, if there was such overhanging shed, and it was high enough to clear the masts of almost all vessels, but not sufficiently high to allow the Benlarig to lie at her dock, the ship must cut her masts, or pay to have her cargo lightened.

Or, again, if there was a bar in front of the dock, but yet sufficient water for almost all vessels to pass, but not enough for the Benlarig, must the ship then lighter at her own expense so much cargo as may be necessary to enable her safely to reach the designated place of discharge? The claimants would not so contend.

Illustrations might be multiplied, but they all would lead to the same conclusion. However preposterous the suggestions may seem they logically result from this extraordinary decision.

Indeed in their brief in the Court below (p. 12) the claimants admit that the ship would be excused if she should be ordered to a place "which by reason of some permanent physical obstacle, was inaccessible both to the Benlarig and to vessels of her size and class."

It is difficult for the petitioner to conceive any distinction between a permanent physical obstacle of one kind, which the claimants admit would excuse the vessel, and permanent physical obstacles of any other kind, which would not relieve the ship, though she would be affected in the same way, physically, by them all.

If there is in reason any such distinction, this

Court is asked to make it clear in order that ship-owners may be advised of the contingencies they may have to meet in chartering their vessels, so that when they have acted with reasonable human foresight with respect to obstacles that might be seen, they shall not subsequently be confronted with those that are unseen, but are conjured up by the "spirit" which the Court of Appeals has found so potent in this charter-party.

The Court of Appeals pass but lightly over the case of "*Re an Arbitration between Goodbody & Co. and Balfour, Williamson & Co.*, 8 Asp. Mar. L. C., 504, with the suggestion that the facts in that case differ from those here. The case is referred to at length in the opinion of the District Judge (fols. 446-454), who found the facts in the two cases to be equal (fol. 454).

In that case Manchester was held not to be a safe port for the Vanduara because the ship could not go up the Manchester Ship Canal to the Manchester docks because the heads of her main and mizzen masts were higher than the limit fixed by the Canal Company's regulations for passing under the Runcorn Bridge.

The contract of sale of the goods provided that the ship should discharge at any safe port.

The bills of lading contained the clause that the cargo should be delivered "at any safe port in United Kingdom, Manchester excepted." The consignees refused to accept the documents with that clause inserted, but the Court held that the words imposed no restriction on the purchaser inconsistent with the terms of the contract.

Bruce, *J.*, said (p. 507):

"*She could not have been ordered to Manchester in any case, because she could not have got under Runcorn Bridge*, and the presentation of documents containing the words 'Manchester excepted' im-

posed no restriction upon the purchaser inconsistent with the terms of the contract of purchase. * * * I may observe that *the contract was for a cargo per Vanduara, a named ship, and, if in point of fact Manchester was not a safe port for her*, it does not seem to me that the defendants were in any way prejudiced by a phrase being introduced into the documents which abridged none of their rights, and imposed no restriction which was not imposed by the terms of the contract itself."

On appeal the judgment of the Divisional Court was affirmed (5 Com. Cas., 59). A. L. Smith, *L. J.*, said (p. 66): "It is abundantly proved that Manchester, taken by itself, was not a safe port for this vessel, because it was found as a fact * * * that it would have been necessary to dismantle the ship to enable her to get under Runcorn Bridge, which is the first bridge vessels going up the canal to Manchester have to pass."

It is to be noted that the Vanduara would no more have had to be dismantled to pass under the Runcorn Bridge than would the Benlarig to pass under the Brooklyn Bridge.

In both cases the vessel's masts would have had to be cut. This circumstance was sufficient in the English case to keep Manchester out of the class of safe ports for the Vanduara; though Runcorn Lay bye below the bridge was part of the port of Manchester and could accommodate vessels not exceeding 5,000 tons.

The case in effect decides that an obstruction in the air which bars access to the place designated for discharge, quite as effectively prevents it from being safe for the ship as if the obstruction were a sand bar or any other obstacle below the water.

As was well said by the Court below (fol. 445):

"It is thought that it is the privilege of the ship to be preserved from self-mutilation, and that she need not be crippled, deformed or dismantled, for

the purpose of delivering her cargo. Apparently that should never be required. It should not be expected."

The Court of Appeals disagreed with this conclusion.

XI.—If there could be any doubt on the construction of the previous clause in the charter, it is altogether removed by the form of the lighterage clause 4, and it is submitted that the Court of Appeals committed a grave error in the construction which they put on it.

The lighterage clause in the charter-party, clause 4, was in these words:

"All goods to be brought to and taken from alongside of the ship, always afloat, at the said charterers' risk and expense, who may direct the same to the most convenient anchorage; *lighterage*, if any, *to reach the port* of destination, *or deliver the cargo at port of destination, remains for account of receivers, any custom of the port to the contrary notwithstanding*" (fol. 27).

The Court of Appeals say that this clause was "a well known provision, and was introduced into charter-parties originally to provide for the payment of lighterage when the vessel was unable to deliver the cargo at a dock to which she had been assigned from a cause to which vessels generally might be expected to be subject, such as shoal water or a bar" (p. 123).

The testimony of the most experienced witnesses for the claimants is directly to the contrary, and is to the effect that the form found here is unusual (*Snow*, fols. 299, 300; *Elliott*, fols. 344-346).

The usual form of the clause apparently is "Lighterage, if any, to be paid by the cargo" (*Snow*, fol. 300), or "Lighterage, if any, to be at the risk and expense of the cargo" (*Elliott*, fol. 352).

This is also seen by reference to the cases cited under this and the preceding point.

The clause in this charter-party is unusual in two particulars, in that it provides (1) that the Receivers are to pay for the lighterage, if any be necessary, *not only to reach* the port of destination *but also to deliver* the cargo at port of destination: and (2) that the lighterage shall be for account of the receivers "any custom of the port to the contrary notwithstanding."

Whether the clause was the usual one or not, it would seem that the error of the Court below was equally manifest. The Court found (p. 124) that the owners knew, or had reason to know, of the height of the Benlarig's masts, "but did not insert a provision in the charter that she should not be required to go above the Bridge, but preferred to rely upon Article 4."

This is a distinct finding that the owners thought that the language of the lighterage clause protected their vessel from going above the Bridge, and intended that it should do so. The stipulation itself is perfectly clear and unambiguous, and is an explicit agreement that if any lighterage is necessary, either to reach the port of destination, or deliver the cargo at the port of destination, the cost of such lighterage shall be paid by the receivers, any custom of the port to the contrary notwithstanding.

It must be remembered that the owners did not know when the charter-party was effected that the vessel was going to New York. The charterer had the choice of a wide range of ports. It may very well be that if any particular port had been contemplated, special provisions would have been put in to that effect; but as this was not the case, the provisions of the charter were made general to protect the ship in any contingencies which might arise. Even after the vessel arrived at the port of

New York, there were a half a dozen miles of piers on the North River, or on the East River below the Bridge which were perfectly suitable for the discharge of Java sugar, and where the vessel could have discharged in safety.

Nor is it any hardship whatever on the receivers that they should be held strictly to the terms of the documents which they bought.

The bills of lading expressly included all the conditions and exceptions of the charter-party. If, therefore, the claimants unadvisedly purchased the documents without sufficiently ascertaining the limitations which were placed on them thereunder, it would seem that they were not entitled, by reason of their ignorance, to increase their rights to the prejudice of the shipowner, who was a party to the original contract, and who should be bound only by the terms of the contract which he himself has made.

The fact that the goods were to be "taken from alongside of the ship always afloat at the said charterers' risk and expense," is of itself sufficient to put the cost of lighterage on the receivers (*Carr v. Austin*, 14 Fed., 419; *The Nifa*, 1892 Prob., 111).

If there could be any doubt as to this, it would be dispelled by the further direction that any necessary lighterage was to be for account of receivers.

There was an attempt on the part of the claimant to show that a custom existed at New York that the ship should pay the lighterage.

Both Courts have found, however, that there was no such custom. If there had been such, evidence of it would have been excluded by the language of the clause (*Brenda S. S. Co., Ld., v. Green* [1900] 1 Q. B., 518).

Indeed, it would seem that under any circumstances evidence of such a custom, even if it existed, would have been inadmissible (*The Nifa* [1892], Prob.,

411; 7 Asp., 324; *Holman* v. *Wade*, London *Times*, May 11, 1877, cited in the *Nifa*, 7 Asp., at p. 325; *Hagton* v. *Irwin*, 5 C. P. D., 130; 4 Asp., 212; *Lishman* v. *Christie*, 6 Asp., 186, 188; 19 Q. B. D., 333, 337).

Whatever the purpose for which a lighterage clause in some form may have been introduced in other charter-parties, the form of it as it occurs here was adopted by the owner to meet the circumstances of his own vessel, and must be regarded as expressing the agreement of the parties at the time it was made.

If the language used were ambiguous, and the meaning could not easily be understood, there might perhaps be some reason for the Court to look outside of the instrument itself in interpreting this clause.

No such situation is presented here.

The Court have found, if indeed a finding were necessary, that "the facts of this case are within the letter of the article," but they further state that they are "not within its spirit."

It is respectfully submitted that this finding is an attempt by the Court to change the contract actually made by the shipowner for some other contract more favorable to the receiver of the cargo which the Court thought should have been made, and that it constitutes a most unwarrantable invasion of the shipowner's vested rights.

XII.—The petitioner believes and avers that the question involved in this case is of such gravity and importance that it justifies the exercise of the jurisdiction vested in this Court to issue a writ of *certiorari* requiring the cause to be brought here for review from the Court of Appeals.

XIII.—Your petitioner presents herewith a certified copy of the transcript of record returned from

the District Court to the United States Circuit Court of Appeals for the Second Circuit, and of the record in the last named court.

Wherefore, your petitioner prays that this Honorable Court will cause the writ of *certiorari* to be issued pursuant to the power vested in this Court by the Judiciary Act approved March 3, 1881, requiring the said United States Circuit Court of Appeals, for the Second Circuit, to certify the whole record and cause to this Court for consideration, and that thereupon this Court will decide the whole matter in controversy between the parties.

And your petitioner will ever pray, &c.

ANTON MENCKE,
Petitioner.
By CONVERS & KIRLIN,
His Proctors.

STATE OF NEW YORK, }
County of New York, } ss.:

E. B. CONVERS, being duly sworn, makes oath and says: I am one of the proctors for the petitioner herein; I have read the foregoing petition, and the same is true to the best of my knowledge, information and belief. The reason why this petition is not verified by the petitioner is that the petitioner is absent at sea. The owners of the *Bedarig* reside in Scotland and have no officer nor agent in this country. This petition is made and presented by due authority, and the application is meritorious, and is not made for the purpose of delay.

E. B. CONVERS.

Subscribed and sworn to }
before me, this 27th }
day of April, 1901. }

CHARLES R. HICKOX,
[SEAL.] Notary Public,
New York County.

I hereby certify that I have examined the foregoing petition, and that, in my opinion, it is well founded, and is entitled to the favorable consideration of the Court.

J. PARKER KIRLIN,
Advocate.